SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 1056.

THOMAS GILCREASE, PETITIONER,

vs.

G. R. McCULLOUGH, H. B. MARTIN, A. E. BRADSHAW, AND A. L. BROWN, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Comes now G. R. McCullough, H. B. Martin, A. E. Bradshaw, and A. L. Brown, respondents in the above-entitled cause, and for their response to the petition for a writ of certiorari filed herein say that said writ should not be issued, on the following grounds and for the following reasons, to wit:

First. The record submitted in said cause shows that there is no Federal question involved in this application decided adversely to the petitioner, Thomas Gilcrease.

Second. The record submitted in support of said petition shows there was not drawn in question in the court below, or

in the opinion rendered by it, the validity of a treaty or statute of or an authority exercised under the United States, nor was there drawn in question the validity of a statute of or an authority exercised under any State, on the ground of the same being repugnant to the Constitution, treaties or laws of the United States, nor was there drawn in question any right, title, privilege or immunity under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, nor was there any decision either for or against the same rendered.

Third. The record submitted in support of the petition for certiorari shows the sole question decided adversely to the petitioner, Thomas Gilcrease, which has any bearing on any treaty, statute or law of the United States, or any right, privilege or immunity claimed by reason of any such Constitution, law, statute or treaty of the United States, was one of fact, namely, whether Thomas Gilcrease was a minor on the 8th day of February, 1911, as minors are defined in the act of Congress of May 27, 1908.

Fourth. The record submitted in support of the petition for certiorari shows that the petition of Thomas Gilcrease was not denied any right, title, privilege or immunity, set up or claimed under the Constitution, treaty, statute, commission or authority of the United States, but the question decided against him was a question of fact, namely, that the evidence introduced in support of his claim of minority on February 8, 1911, as minority is defined in the act of Congress of May 27, 1908, did not establish the fact of minority on said day, and that the certified copy of the enrolment record introduced in evidence to establish the fact of such minority did not show that Thomas Gilcrease was a minor on such date.

The respondents further say that this cause was commenced in the District Court of Tulsa County, Oklahoma, by a petition, in which Thomas Gilcrease, in short, set up that at the time of the execution of the various instruments set out and described therein he was a minor as minority is defined in the

act of Congress of May 27, 1908; that the contracts set out were made in reference to lands allotted him as a citizen of the Creek Tribe or Nation of Indians, and that all of said conveyances had been procured by fraud. The trial court found against Thomas Gilcrease on the issue of fraud and held that if he was a minor at the time of the execution of the various contracts set out in his petition in the cause he could ratify said contracts after becoming of age, under the act of May 27, 1908, and that after so becoming of age he had ratified the contracts, and judgment was rendered against Thomas Gilcrease.

On the rendition of the judgment against him by the trial court, Thomas Gilcrease appealed the cause to the Supreme Court of Oklahoma, which court found that there was no evidence showing fraud, and holding that the oil and gas mining lease dated August 24, 1909, being executed when Thomas Gilcrease was admittedly a minor in fact, would be void by reason of the act of May 27, 1908, and holding that the certified copy of what is known as the roll card proved the degree of blood of Thomas Gilcrease, but did not prove the date that he was enrolled, and that the certificate of the certifying officer as to the date of enrollment was incompetent to prove such date, and holding that that contract of February 8, 1911, was made when Thomas Gilcrease was in fact twenty-one years of age, and that the certified copy of the enrollment record introduced for the purpose of establishing that he was a minor under the act of May 27, 1908, did not establish the fact of such minority on account of failing to show when he was nine years of age, or the date of his enrollment.

It is one of the admitted facts in the record that Thomas Gilcrease was twenty-one years of age on February 8, 1911, and consequently had the same right to deal with his property the same as any other citizen of the State of Oklahoma, unless prevented from so doing by some restraint placed on him by the laws of the United States. Thomas Gilcrease is a

Creek Indian of one-eighth degree of blood, and consequently falls within the provisions of section 1 of the act of May 27, 1908, which, in so far as it is material to this question, is as follows:

> "That from and after sixty days from the date of this act the status of lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes, shall, as regards restrictions on alienation or encumbrance, be as follows: All lands, including homesteads of said allottees enrolled as intermarried whites, as freedmen and as mixed-blood Indians having less than one-half Indian blood, including minors, shall be free from all restrictions * * *."

It is therefore evident that this provision of law relieves all restrictions against Indians, including minors of the class to which Gilcrease belongs, and he would have full power and authority to deal with his lands as any other citizen of Oklahoma of the same years and discretion would have, unless restrained from so doing by some further provision of the act. It is claimed that such restraint is imposed on him notwithstanding that section 1 provides that all lands belonging to the class of which Gilcrease is one, "shall be free from all restrictions" by the following provisions of the act. The second proviso of section 2 is claimed, in connection with other provisions of the act, to have the effect of imposing restraints on the land. Such proviso is as follows:

> "That the jurisdiction of the probate courts of the State of Oklahoma, over lands of minors and incompetents, shall be subject to the foregoing provisions, and the term minor or minors, as used in this act, shall include all males under the age of twenty-one years, and all females under the age of eighteen years."

That part of section 3, which is contended should be taken in connection with the portion of section 2 above quoted, and a portion of section 6, to be hereafter quoted, replaced restrictions on land, and is as follows:

> "That the rolls of citizenship of freedmen of the Five Civilized Tribes approved by the Secretary of the Interior, shall be conclusive evidence as to the quantum of Indian blood of any enrolled citizen or freedman of said tribe, and of no other person, to determine questions arising under this act, and the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman.'

The portion of section 6 relied on is as follows:

> "That the persons and property of minor allottees of the Five Civilized Tribes, shall, except as otherwise specifically provided by law, be subject to the jurisdiction of probate courts of the State of Oklahoma. * * * Provided that no restricted lands of living minors shall be sold or encumbered, except by leases authorized by law by order of the court, or otherwise."

Conceding for the purpose of this argument, and for such purpose alone, that the act of May 27, 1908, after declaring in express terms that it removes all restrictions from all lands of Indians of the class to which Gilcrease belongs, and reimposes a restriction on the land which in effect declares the land incapable of sale during minority, except by an order of the court, and consequently it was not the purpose of the act merely to define the period of minority and confer on the Indian, during such period, the benefits, burdens, and privileges belonging to minority, it is evident that the petitioner, Thomas Gilcrease, could not be denied any right, title, privilege, immunity, or authority under such act, unless the enrollment records, which are made "conclusive evidence as to the age of said citizens or freedmen," do in fact disclose his age, and that according to the age so disclosed Gilcrease would have been a minor on February 8, 1911, as otherwise he would not bring himself within the terms of the act.

The certified copy of the enrollment records introduced in evidence wholly failed to show that Gilcrease was a minor on February 8, 1911, but did show that at some time not

named Gilcrease was nine years of age, and an exact reproduction of such record, together with the certificate of the officer certifying the same, which was introduced on the trial of the cause in the trial court, and made a part of the record for appeal to the Supreme Court, is here submitted for the convenient inspection of this court. It is contended that the words and figures "June 9/99," in the lower right-hand corner of the record, means that that is the day on which the petitioner, Thomas Gilcrease, was enrolled, and that the figure "9," in the column headed "age," shows that he was nine years of age on June 9, 1899, that being the date of enrollment. No evidence was introduced on the trial explaining the card or telling what the date in the lower right-hand corner meant, whether it was date of enrollment or date on which copy of the record known as census card was issued.

It is true that the certificate of the officer certifying the roll card states that Thomas Gilcrease was enrolled as of June 9, 1899. The roll card, under the express language of the act, is not the enrollment record, and such card, like the enrollment record offered, does not show the date of enrollment, and the Supreme Court very properly held in this cause that such roll card was not evidence as to date of enrollment, and that the certificate could not supply such defect, as the office of the certificate was merely to certify to the correctness of the record, and not to any fact not shown by the record so certified. The Supreme Court, in Jackson *et al. vs.* McGilbray, 148 Pac., 703, not yet officially reported, passes on this identical question, and has been followed in every subsequent decision in the State, and is now the established law of Oklahoma, and unquestionably states the true rule of law, and should not be disturbed at this time, even if the doctrine therein announced was doubtful.

The petitioner contends that the enrollment record above mentioned shows Thomas Gilcrease would not be of age, under the act of May 27, 1908, until June 9, 1911. We confess we are unable to say that the enrollment record so shows or to appreciate the force of such reason. The act of

May 27, 1908, makes the enrollment records the exclusive evidence, and we assert it is impossible to determine when Gilcrease became of age from such records. It is the enrollment record that Congress makes the exclusive evidence of age, not records aided by assumption and resting on supposition, but actually existing records. It is impossible for any person to examine the reproduction of the enrollment records herewith submitted and determine therefrom the age of Thomas Gilcrease. It is contended, or rather assumed, by petitioner that the words in the lower right-hand corner of the record, "June 9/99," mean that June 9th is to be taken as the day on which Thomas Gilcrease became nine years of age, or from which such age should be reckoned. It is evident such a conclusion cannot be arrived at from the face of the record itself, and it is only by supposing something that the record does not disclose that such a conclusion can be considered well founded. Congress has made the enrollment records as they exist the conclusive evidence of age, not some supposititious record, not some record aided and abetted by what this court or someone else might determine should be read into the record, or what the record was intended to, but does not in fact, disclose. Congress enacted that on the production of the enrollment records showing the age, such age so shown should be conclusive, and the matter of age put at rest thereby. It did not mean if, in a particular case, the record failed to disclose the age, fiction, construction, and suppositions should be resorted to in order to eke out a deficient record for the supposed purpose of giving effect to the act of Congress. Why we should assume that the words and figures "June 9/99," in the lower right-hand corner of the record, mean that Thomas Gilcrease was enrolled on that day is not apparent. It is suggested, however, we must so hold in order to give effect to the act of Congress. How so holding would effectuate the purpose of Congress we are at a loss to determine. It seems to us it would be directly contrary to the congressional intention, for Congress has made the existing records conclusive evidence. We would be making

a supposititious record, and then saying the record thus made is the record meant by Congress, if we should adopt such reasoning. It may be that the enrollment records fail to disclose in a particular case the age of a particular Indian, and thus the intention of Congress in making the enrollment record conclusive evidence would fail in that particular instance. If such record does not show the age of an Indian, the purpose of the act of Congress in making such enrollment records conclusive evidence as to such Indian fails, because the facts supposed by Congress to exist do not exist. That does not, however, call upon courts to manufacture, by reasoning, a record, and then apply the act of Congress to the record so manufactured.

The ruling of the Supreme Court of Oklahoma in this cause, in reference to the enrollment records not disclosing the age of an Indian allottee, was the law of Oklahoma prior to the decision in this cause, and this decision merely followed the law already established in the jurisdiction. The law as so established has since been followed, and is being followed every day, and should not be disturbed, unless it is impossible to reconcile such holding with the express provisions of the act. The rule has been recognized and followed in the following cases not yet officially reported:

Jackson *vs.* Lair, 150 Pac., 162.
Heffner *vs.* Harmon, 159 Pac., 651.
Hart *vs.* West, 161 Pac., 534.
Jordan *vs.* Jordan, 162 Pac., 758.

The rule of the State court set out in the above cases is also the rule of the Federal courts, and such courts arrive at the same conclusion even where it was admitted that the date in the lower right-hand corner of such record was the date of enrollment. This has been the conclusion of the Circuit Court of Appeals of the Eighth Circuit in two cases: McDaniel *et al. vs.* Holland, 230 Fed., 945; Etchen *vs.* Cheney, 235 Fed., 104. This rule of law, sustained and upheld by the

Supreme Court and the Circuit Court of Appeals, should not be overturned except in the interest of the general public welfare, or unless it is so clearly wrong that it should not be permitted to stand.

The instrument dated February 8, 1911, is clearly a sufficient lease, and whether this be so or not is purely a question of State law involving no Federal question, and whether the same is supported by a consideration is a question of fact, which involves no right, privilege or immunity which petitioner is denied under the laws of the United States. The fact that an Indian minor might have made a contract in reference to his lands while a minor, which we all assume to be void under the statute of May 27, 1908, is no reason why he can not make a new contract in reference to the same lands to the same parties when he becomes of age. This is a well-established law in Oklahoma by a line of well-considered cases, among which are the following:

Oates *vs.* Freedman, 157 Pac., 74.
Henley *vs.* Davis, 156 Pac., 337.
McKeever *vs.* Carter, 157 Pac., 56.
Hope *vs.* Foley, 157 Pac., 727.
Bruner *vs.* Cobb, 131 Pac., 165.
Chandler *vs.* Rowe, 148 Pac., 1026.
Lewis *vs.* Allen, 142 Pac., 384.

The record submitted in this cause shows that Gilcrease, after June 9, 1911, the date he claims that he was of age by the records, and only a short time before the filing of this cause in the trial court, ratified, confirmed, and adopted the transaction set out in his petition in the trial court, by buying back from a portion of the defendants in the cause an interest in the land, and signing and executing division orders for his proportion of the oil under his contract, and permitting the payment of the portions the defendants would be entitled to under his

contract to them. This he had a right to do, and by so doing ratified and confirmed the transactions complained of.

Hartman *vs.* Butterfield Lumber Co., 199 U. S., 235.
Capps *vs.* Hensley, 23 Okl., 311.
Clough *et al. vs.* Clough, 33 Me., 487.

It is contended that the act of May 27, 1908, imposes a restriction on the land of Indian minors of less than half-blood. We submit that such a contention is not sound and the claim that it is upheld by the decision of this court in Truskett *vs.* Closser, 236 U. S., 223, is not warranted. The Circuit Court of Appeals in that case held that no law of the State seeking to confer on an Indian during the period of minority prescribed by the act the privilege and powers of majority, could in fact give such privilege, and therefore held that a State law permitting the removal of disabilities of minority and giving a minor the right to deal with his land with the same effect as a person who has reached his majority, did not apply to Indian minors during the period of minority prescribed by the act of Congress, and to so hold would be to make the statute void. On appeal this court affirmed the decision of the lower court, on the ground that the act of Congress was the dominant law, and that no State statute could interfere therewith.

As the enrollment records introduced in evidence, as shown by the record, do not give either the date of enrollment or the date on which petitioner, Thomas Gilcrease, became nine years of age, the Supreme Court of Oklahoma was correct in holding that the record did not show that Thomas Gilcrease was a minor under the act of May 27, 1908, on the 8th day of February, 1911, but as he was admittedly of age in fact on that day it properly gave his contracts effect, and such holding is not a construction of the act of Congress of May 27, 1908, or a denial of any right or privilege thereunder, but merely shows that Thomas Gilcrease did not bring himself within the purview of the act, and hence there was no necessity of

its construction. Therefore, what the court says in reference to the enrollment records when they do show the date of application for enrollment, in regard to such records in such condition not showing the exact age, is, as far as the case now under consideration is concerned, dicta, and if error, the petitioner, Thomas Gilcrease, has not been prejudiced thereby, because the opinion and the judgment of the Supreme Court must have been the same as that complained of, no matter what its conclusion may have been as to the effect of the enrollment records disclosing the date of application, and its following the Circuit Court of Appeals in this regard is without influence on the result reached. Such result must have been the same, regardless of the conclusion as to the effect of the enrollment records disclosing the date of application.

We insist that an inspection of the record shows that the Supreme Court of Oklahoma did not render any opinion in this case which adversely affected any right, title, privilege, immunity, interest or estate of Thomas Gilcrease, the petitioner herein, founded on or growing out of the Constitution or any law, treaty, statute or authority of the United States, and that the petition should be denied.

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